

1 ALBERT J. BORO, JR. (CA Bar #126657)  
2 *ajboro@boro-law.com*  
3 BORO LAW FIRM  
4 345 Franklin Street  
5 San Francisco, CA 94102  
6 Telephone: (415) 621-2400  
7 Facsimile: (415) 276-5870

8  
9 ALANNA D. COOPERSMITH (CA Bar #248447)  
10 *alanna@eastbaydefense.com*  
11 Attorney at Law  
12 717 Washington Street  
13 Oakland, CA 94607  
14 Telephone: (510) 628-0596  
15 Facsimile: (866) 365-9759

16 Attorneys for Defendant  
17 RAYMOND FOAKES

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

29 UNITED STATES OF AMERICA,

30 No. 17-CR-00533-EMC

31 Plaintiff,

32 MOTION FOR MISTRIAL BASED ON  
33 GOVERNMENT'S REBUTTAL CLOSING  
34 ARGUMENT

35 v.

36 Court: Hon. Edward M. Chen

37 RAYMOND MICHAEL FOAKES,

38 Defendant.

39  
40 TO: ISMAIL RAMSEY, UNITED STATES ATTORNEY, AND KEVIN J. BARRY AND

41 LINA Y. PENG, ASSISTANT UNITED STATES ATTORNEYS:

42  
43 PLEASE TAKE NOTICE that as soon as the matter may be heard, in the courtroom of the  
44 Honorable Edward M. Chen, United States District Court Judge, defendant Raymond Foakes, through  
45 his counsel, will move and hereby does move for a mistrial based on the Government's improper  
46 argument in its rebuttal closing argument that the alleged "toy run fraud" was racketeering activity that  
47 supports a conviction under Count One (RICO conspiracy). This motion is based on Mr. Foakes's  
48

1 constitutional rights to stand trial only on charges returned by the Grand Jury and to due process of  
 2 law and the right to a fair trial guaranteed by the Fifth and Sixth Amendments to the United States  
 3 Constitution, Sections 1961 and 1962 of Title 18 of the United States Code and such other laws and  
 4 rules that may be applicable to this matter, the attached memorandum of points and authorities, the  
 5 files and records in this action, and any additional evidence and argument as may be submitted at or  
 6 before the hearing of this matter.

7

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 During the Government's rebuttal closing argument on May 12, 2023, the prosecution argued  
 10 for the first time in the trial that the annual charitable toy run held during the Christmas season by the  
 11 Hells Angels Sonoma County charter ("HASC") constituted racketeering activity that supported a  
 12 conviction of Mr. Foakes under Count One (RICO conspiracy). This argument constitutes  
 13 prosecutorial misconduct. In its rebuttal closing argument, the Government divided up the alleged  
 14 racketeering activity into acts that occurred while Mr. Foakes was in prison and while he was out of  
 15 BOP custody. The Government's argument was intended to counter Mr. Foakes's defense that he  
 16 was not part of the alleged RICO conspiracy because he was in custody during most of the alleged  
 17 conspiracy period. The prosecutor stated:

18       **"MR. BARRY:** And as I indicated, and as the evidence said, that one of the  
 19 reasons that Michelle Conte was threatened is because the Form 12 generated an  
 20 arrest for Mr. Foakes. So, yes, he was in custody, and there should be no dispute  
 about that.

21       "Then there is some racketeering activity that transcends the eras that we can't  
 22 pin a certain time on it based on the evidence, and that would be the toy run fraud.

23       "So Mr. Conte testified that, over time, toy drive fundraising money was  
 24 diverted to the club. Again, the toys still went to the kids, but additional funds that  
 25 were raised weren't used to buy more toys; they went to the Sonoma County Hells  
 Angels.

26       "And again –

27       **"MR. BORO:** Objection, Your Honor. Variance.

28       **"THE COURT:** All right. Again, the -- counsel's statements are not facts.  
 Your memory of the facts controls.

1                   **“MR. BARRY:** And, Your Honor, Mr. Boro knows that no racketeering  
 2 acts needs to be alleged, so that cannot possibly be a variance based on that.

3                   **“THE COURT:** Well, let's go on.

4                   **“MR. BARRY:** Another racketeering -- category of racketeering activity  
 5 that doesn't have a specified time limit is extortion. Because of the nature of the  
 6 Sonoma County Hells Angels' extortion, for lack of a better word, is forever.”

7 Trial 2 Tr. at 7005.

8                   The Government's request to the jury to convict Mr. Foakes for RICO conspiracy based on  
 9 alleged racketeering activity of the “toy run fraud” was an impermissible variance from the  
 10 Superseding Indictment (Dkt. #374). The Grand Jury did not allege fraud in “The Means and  
 11 Methods of the Enterprise” allegations and did not include fraud in the “pattern of racketeering  
 12 activity” of HASC in the Superseding Indictment. *Id.* at ¶¶ 13-17 & 20-21. In fact, the word “fraud”  
 13 is only used in the Superseding Indictment in the overt act concerning alleged “bank fraud and  
 14 money laundering in connection with a mortgage fraud scheme.” *Id.* at ¶ 22(a). And that overt act  
 15 was excluded by the Court from the trial as a remedy for the Government's breach of Mr. Foakes's  
 16 2011 plea agreement. *See Order Granting in Part Defendant Foakes's Motion to Dismiss Count One,*  
 17 filed Jan. 25, 2023 (Dkt. #3128). The Government's urging the jury to convict based on the “toy run  
 18 fraud” was a material variance of the racketeering conspiracy charged in the Superseding Indictment  
 19 in violation of Mr. Foakes's Fifth Amendment right to only stand trial on charges returned by the  
 20 Grand Jury. U.S. Const. amend. V.

21                   Moreover, this rebuttal argument is prosecutorial misconduct that materially misstates the  
 22 law and violates Mr. Foakes's constitutional rights to due process and a fair trial. U.S. Const.  
 23 amend. V & VI. It is contrary to the law and the jury instructions. Generalized “fraud” does not  
 24 come withing the definition of “racketeering activity” in Section 1961. 18 U.S.C. § 1961(1). The  
 25 Government introduced no evidence at trial and made no argument in closing that the so-called “toy  
 26 run fraud” constituted mail fraud or wire fraud under Sections 1343 and 1344 of Title 18. *See* 18  
 27 U.S.C. § 1961(1)(B). Thus, the alleged “toy run fraud” does not fall within the statutory definition  
 28 of racketeering activity. It also does not qualify as racketeering activity under the Court's final jury  
 instructions, which did not include any species of fraud as racketeering activity at issue in the case.

1 See Order re Third Amended Closing Final Jury Instructions No. 50, filed May 10, 2023 (Dkt.  
2 #3444). The Government's argument has improperly invited the jury to convict Mr. Foakes for  
3 RICO conspiracy based on conduct that does not constitute racketeering activity as a matter of law.

4 **CONCLUSION**

5 For the foregoing reasons, Mr. Foakes respectfully requests that the Court grant his motion  
6 for a mistrial due to prosecutorial misconduct in the Government's rebuttal closing argument.

7 Dated: May 16, 2023

8 Respectfully Submitted:

9 BORO LAW FIRM

10 /s/ Albert J. Boro, Jr.

11 ALBERT J. BORO, JR.

12 ALANNA D. COOPERSMITH  
13 ATTORNEY AT LAW

14 Attorneys for Defendant  
15 RAYMOND FOAKES